

1992

Patricia Kirberg v. West One Bank : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 920706

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

PATRICIA KIRBERG,	:	
	:	
Plaintiff/Appellant,	:	
	:	
v.	:	
	:	Appeal No. 920706-CA
WEST ONE BANK,	:	
	:	
Defendant/Appellee.	:	Category 16

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE FRANK G. NOEL

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DEC

COURT OF APPEALS

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

PATRICIA KIRBERG,	:	
	:	
Plaintiff/Appellant,	:	
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	:	Appeal No. 920706-CA
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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Annotated Sec. 78-2-2(3)(j). The order appealed from is a final order disposing of all claims of all parties.

ISSUE PRESENTED ON APPEAL

Whether the trial court erred in ruling that Kirberg had failed to produce sufficient facts to create a jury question whether the initial "at-will" relationship of the parties had been modified by subsequent representations and conduct of West One. The standard of review is correction of error, since a grant of summary judgment presents a question of law only. Johnson v. Morton Thiokol, Inc., 818 P.2d 977, 1000 (Utah 1991).

DETERMINATIVE AUTHORITY

The determinative authority for this appeal is Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991), and Brehany v. Nordstrom, Inc., 812 P.2d 49, 56 (Utah 1991).

STATEMENT OF THE CASE

1. Nature of Case:

This appeal is from a final order of the Third Judicial District Court, Hon. Frank G. Noel.

2. Course of Proceedings:

Kirberg filed a complaint for breach of implied contract, and breach of covenant of good faith and fair dealing. She alleged that West One had violated an implied promise not to terminate her without cause. This termination was alleged to also violate an implied covenant of good faith and fair dealing. The count relating to a covenant of good faith and fair dealing was dismissed by agreement of the parties.

West One moved for summary judgment on plaintiff's remaining complaint for breach of implied contract. West One relied upon a disclaimer of any implied promise regarding termination without cause. This disclaimer was found in the fine print of Kirberg's employment application form. Kirberg opposed the motion with her affidavit, setting forth what she was told, the termination practices she observed, and the employee manual, giving the basis for her understanding that West One had a corporate policy against termination without cause. Kirberg specifically averred that the any initial at-will relationship had been modified by subsequent representations and conduct.

West One also argued that it had "cause" for terminating Kirberg. Kirberg opposed this motion by averring that she was historically a good employee, and that she had acted reasonably in handling a difficult situation.

3. Disposition in Lower Court:

The trial court dismissed the complaint, reasoning that West One was entitled to judgment as a matter of law based upon the written disclaimer in the employment application form. The trial court did not rule on whether there was a jury question as to just cause for terminating Kirberg.

STATEMENT OF FACTS¹

Kirberg was hired by West One in October, 1988 as a bank teller. (R. 41). When she applied for work at West One, she filled out an application form. This form contained, in fine print, a short statement that Kirberg could be "discharged at any time without notice and without cause." (R. 118). Further, the form even stated in the fine print that there was "no express or implied employment contract between [her] and the company [West One]". (R. 118). Kirberg never read the disclaimer of implied terms or the disclaimer of requirement of just cause when she was hired as a teller. It was simply included in the forms she was to fill out. It was never referred to in the employment interview, and there was no oral statement made to her that she could be fired without cause. (R. 93, ¶2).

¹ Since summary judgment was granted against Kirberg, the facts in the record are construed most strongly against West One.

The disclaimers given Kirberg when she was hired as a teller were never referred to again, in either her own employment, or regarding the employment of others. (R. 93, ¶12). There was no evidence that Kirberg was given a copy of the application form.

In February, 1989, Kirberg was promoted from teller to branch manager of the West Jordan branch of West One bank. (R. 41). As branch manager, Kirberg's duties included personnel issues in the West One branch. This in turn included employee discipline and termination issues. (R. 94, ¶16). Kirberg was given a Human Resource Policy Manual, to use in employee matters involving employees under her. A copy of a portion of the Manual entitled "Dismissal" is attached to this affidavit. (R. 94, ¶17).

The Human Resource Policy Manual sets forth a system of progressive steps of employee discipline, starting with supervisory counseling, and verbal warning, and escalating to written reprimand, probation, suspension and dismissal. The Manual advises that the severity of the problem is related to the degree of discipline. (R. 94, ¶18-9). Kirberg understood from reading the Manual, from observing the employee discipline practices around her, and was advised and trained as a branch manager, that any discipline should be at the lightest (least) level necessary to correct the problem. (R. 94, ¶18-9). Further, Kirberg understood, and was trained (as a branch manager), that an employee's problems

needed to be fully documented or proved before they could be disciplined, to justify the severity of any action taken. (R. 94, ¶10).

Kirberg was specifically taught that a West One employee was not to be fired without cause. (R. 94, ¶11). Further, in the hiring/firing practices Kirberg observed, no employee was ever fired without cause. (R. 94, ¶11). In fact, there were at least two instances where Kirberg wanted to dismiss an employee under her for poor judgment and/or performance, but was told she could not by her superiors. Instead, Kirberg was told that she must first counsel the employee, and warn them. In one instance, the employee was simply not showing up for work. This person was ultimately transferred to another department. (R. 94, ¶12).

The only instance where someone under Kirberg was dismissed, involved someone who admitted to stealing customer's money. (R. 94, ¶13). Even this for-cause dismissal did not come until after the employee personally confessed; prior to the confession, Kirberg was not allowed to dismiss her. (R. 94, ¶13). Based upon what Kirberg was told, taught, read, and observed, she reached a clear understanding that West One had a policy of not firing people without cause. (R. 94, ¶11).

During the time of Kirberg's employment, her conduct was exemplary, and she never received any substandard written employee

reviews. (R. 2). In January, 1991, she was evaluated as an employee, and given good marks and an 8% pay raise. (R. 88-92). However, in late 1990, at a Chamber of Commerce meeting, Kirberg had heard an unsubstantiated rumor that Dr. Robert Davis, a medical doctor with substantial deposits at West One, and a substantial existing loan, had been charged with rape and Medicaid fraud. (R. 43, ¶13; 44, ¶17; 96, ¶16). Kirberg was told that the problems were several years old, and had been resolved. (R. 96, ¶16). Kirberg checked his loans, and found they were all current. (R. 96, ¶17). Davis' loans remained current, and at least one has been completely paid off. (R. 96, ¶18).

In early 1991, Davis sought another loan from West One. (R. 96, ¶19). At the time of Davis' application for all his loans, branch managers such as Kirberg were directed to submit loan applications to a loan officer for review. Accordingly, Kirberg referred Davis' loan application to the loan officer for his review and approval. (R. 96, ¶20). Shortly thereafter, Kirberg learned that the FBI was at that moment investigating Davis. (R. 96, ¶21). Kirberg immediately called the loan officer, and told him to be cautious in deciding whether to give a loan to Davis. Kirberg explained to him that the FBI was apparently investigating Davis. (R. 96, ¶21).

Once West One confirmed that Davis was being investigated by the FBI, they fired Kirberg for failing to tell them in late 1990 about his legal problems. (R. 46, ¶126). Kirberg was fired despite the fact that Davis met the ordinary loan underwriting guidelines of West One, and West One had no way to call Davis' loans anyway. (R. 96, ¶115, 22-25). Kirberg was fired despite the fact that she was told that Davis' legal problems were several years old, and had been resolved. (R. 96, ¶116). West One never alleged that it lost one penny from Davis' accounts. The inference (most favorable to Kirberg) is that West One simply overreacted to hearing bad news about a customer, and fired a good branch manager in a panic.

SUMMARY OF ARGUMENT

Kirberg was initially an "at-will" employee of West One. Kirberg averred that there was a subsequent agreement that she would not be fired except for cause. A jury could find this modification was created by subsequent statements of Kirberg's West One supervisors, the use and construction given the Employee Manual, and the actual employee termination practices of West One. The trial court erred by assuming that these facts, assumed to be true, were insufficient to modify the initial "at-will" relationship.

ARGUMENT

POINT I

KIRBERG'S INITIAL "AT-WILL" CONTRACT WITH WEST ONE WAS MODIFIED BY WEST ONE'S CONDUCT AND STATEMENTS

A. An Express At-Will Employment Contract Can Be Modified By Subsequent Representations and Conduct.

An "at-will" employment relationship can be modified by a subsequent express or implied agreement. Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991). In Johnson, all five justices of the Supreme Court agreed that an initial written "at-will" agreement found in an employee manual could be modified by a subsequent express or implied agreement:

. . . it is true that subsequent expressed or implied agreements could have modified the [written] at-will employment relationship [found in the handbook]. . .".

Johnson, at 1004. The majority and the concurrence both clearly agreed that "an express contract can be modified by a subsequent implied contract." Johnson, at 1004, fn. 29; see also 1005-1006. Accord, Helle v. Landmark, Inc., 472 N.E.2d 765 (Ohio App. 1984) (subsequent oral promises negated written disclaimer in policy manual).

This is simply the flip side of the proposition that an employment contract can be modified to include an "at-will"

provision. See Chambers v. Valley Nat'l Bank, 721 F.Supp. 1128 (D. Ariz. 1988)(after 14 years, employer added at-will disclaimer); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).² See also Comment, Unilateral Modification of Employment Handbooks: Further Encroachment on the Employment at Will Doctrine, 139 U. Penn. L. Rev. 197, 216-219 (1991). What an employer can take away, it certainly can give back.

B. Kirberg's Evidence Raised A Jury Question Whether The "At-Will" Relationship Had Been Modified.

An employment agreement can be modified in the same ways that it can be created:

The evidence that is relevant . . . includes the language of the manual itself, the employer's course of conduct, and pertinent oral representations.

Brehany v. Nordstrom, Inc., 812 P.2d 49, 56 (Utah 1991). See also Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989) which stated that the at-will relationship could be modified by "employment manuals, oral agreements, and all circumstances which demonstrate the intent to terminate only for cause . . .", as well as "conduct of parties, announced personnel policies, practices of that particular trade or industry, or other circumstances".

² These cases were cited with approval by the majority opinion in Johnson.

Johnson held that the language of the manual itself, could not modify a statement in that same manual which set forth an "at-will" relationship. Johnson had only relied upon the manual; there were apparently no other representations, personnel practices or course of conduct that went beyond the manual.

In contrast, Kirberg averred that she was taught that she could not fire employees, except for cause. Kirberg stated that when she tried to fire incompetent employees, she was told she could not, because there was not cause. She was further taught that the Employee Manual restricted termination, except for documented, serious problems. Whether this construction of the Manual was legally correct or not, that is how the Manual was used in practice. Finally, the employee termination practices that she observed strongly indicated that West One employees were not to be terminated without documented cause.

Johnson, at 1002, held that the "express statements of the employer" were sufficient to modify an "at-will" relationship. Kirberg relied not only upon the express statements of the employer, but the Employee Manual, its construction and use in practice, and the course of conduct of West One in its employee termination practices. These were "communicated to the employee [Kirberg]", they were "sufficiently definite to operate as a contract provision", and were such that Kirberg could "reasonably

believe" West One's statements and conduct. Johnson, at 1002. A jury could easily find that West One modified the fine print by its subsequent words and actions.

C. West One's Disclaimer Could Be Modified, Despite Its "Non-modification" Language.

West One's disclaimer in the application form stated that no company representative had authority to modify the disclaimer. (R. 118). In Hardy v. Prudential Ins. Co. of America, 763 P.2d 761, 768 (Utah 1988), the Utah Supreme Court held that an insurance agent could modify or waive provisions in an insurance application, despite "boilerplate nonwaiver provisions if the insured reasonably relied upon the agent's representations to the contrary. [Citations omitted]." There is likewise no reason why a bank official should not be able to modify an employment agreement, despite "boilerplate nonwaiver provisions" in the employment application.

The question of whether Kirberg was reasonable in relying upon the representations and conduct of West One is one for the jury. See Hardy v. Prudential, supra, at 769. Kirberg stated that she was never aware of the disclaimers in the employment application, and that they were never referred to in her training about employee termination practices. Under these circumstances, a jury could find her reliance upon what she was told and observed to be reasonable.

D. Employees Should Not Be Manipulated By Oral Promises of Job Security, Coupled With Contrary Written Disclaimers.

Employers use promises of job security as a motivational device to encourage employee loyalty and productivity. See Note, Challenging the Employment-at-Will Doctrine Through Modern Contract Theory, 16 U.Mich.J.L.Ref. 449 (1983). On the other hand, ". . . arbitrary discharge creates severe financial and emotional hardships for employees who have relied upon express or implied assurances of job security." Id.

West One argued successfully to the trial court that use of a written disclaimer could not be overcome with subsequent express representations and conduct promising job security. West One's position, which ignores the holding of Johnson, is patently unreasonable. If West One is correct, an employer can lie to an employee for 45 years, stating that the employee will only be fired for cause. However, if the employer had the foresight to insert a disclaimer in the original application form, the unfortunate employee would be without a remedy as a matter of law if arbitrarily fired 45 years later. Or, if the employee periodically inserts the disclaimer on the back of paychecks, or in other inconspicuous places, it will insulate itself from complying with its promises of job security. But it was these abuses of the

employer/employee relationship that Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989), and its progeny sought to correct.

This court should not give a judicial blessing to West One's practice of promising job security to motivate hard work and loyalty from its employees, while inserting disclaimers into job application forms. Most employees will not be sophisticated enough to realize that West One's promises are contradicted by the fine print. Few employees will have the bargaining power necessary to negotiate a revision to the job application form. The relationship is one of great inequality; by definition, one party is hoping for a job from the other. This job is given as a matter of grace, and prospective employees are exceedingly unlikely to even ask questions about the meaning of fine print in the application form.

Given this relationship, the subsequent promises and conduct of the employer should be given equal or greater weight than a self-serving disclaimer inserted in an application form or employee manual. The written disclaimers should simply be considered by the jury in connection with all other manifestations of contractual intent, to determine whether there was an express or implied promise of job security.

CONCLUSION

West One wants to have its cake, and eat it too. On the one hand, it promotes employee dedication and loyalty through job security promises and practices. On the other hand, it wants to retain the right to violate these promises at its whim, by use of disclaimers.

If the mere use of disclaimers is sufficient to insulate employers from being held to their subsequent promises, then working class people have every reason to view the justice system with cynicism. The courts are not so helpless, however, If a jury finds that West One has contradicted its written disclaimer by subsequent promises and/or conduct, West One should be held accountable.

DATED this 1 day of December, 1992.

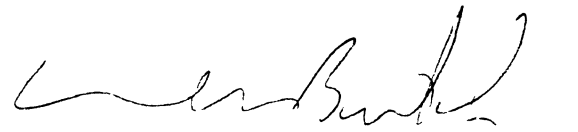


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West Valley City, UT 84120
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 1 day of December, 1992, I served a true and correct copy of the foregoing PLAINTIFF/APPELLANT'S BRIEF upon the following, by depositing four copies thereof in the United States mails, postage prepaid, addressed as follows:

Elizabeth Dunning
Carolyn Cox
Watkiss, Dunning & Watkiss
111 East Broadway, Suite 800
Salt Lake City, UT 84111



Daniel F. Bertch

DEC 2 1992

COURT OF APPEALS

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

PATRICIA KIRBERG,	:	
	:	
Plaintiff/Appellant,	:	ADDENDUM TO APPELLANT'S BRIEF
	:	
v.	:	
	:	
WEST ONE BANK,	:	Appeal No. 920706-CA
	:	
Defendant/Appellee.	:	Category 16

ADDENDUM TO BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE FRANK G. NOEL

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MINUTE ENTRY OF DISTRICT COURT - 6/29/92

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

PATRICIA J. KIRBERG,

Plaintiff,

vs.

WEST ONE BANK,

Defendant.

MINUTE ENTRY

Case No. 910901640 CV

JUDGE FRANK G. NOEL

Now before the Court is defendant West One Bank's Motion for Summary Judgment. The Court has reviewed the memos and affidavits filed in connection therewith, has heard oral argument and having taken the matter under advisement now rules as follows:


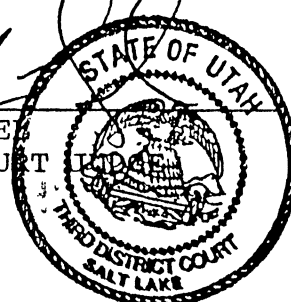
It is clear to the Court that the initial employment relationship between plaintiff and defendant under the facts of this case was an "at-will" employment relationship. The question before the Court is whether there is sufficient facts to create a triable issue as to whether the parties intended to modify the employment relationship to limit the defendant's

ability to terminate plaintiff. Kirberg argues that certain conduct of the defendant and certain procedures set out in the employee manuals created an implied-in-fact contract providing that she could be terminated only for good cause.

It is important to note that the application signed by plaintiff and the employment manual in effect throughout Kirberg's employment contained disclaimers expressly stating that she could be discharged without notice and without cause, that there was no express or implied employment contract between her and the company and further that adherence to the policies and guidelines contained in the code of conduct did not constitute an expressed or implied contract. The Court has reviewed the facts which plaintiff relies on to support her claim that in spite of the disclaimers there was an implied in fact contract between plaintiff and defendant and that could be terminated only for good cause. The Court finds those facts relied on by plaintiff to be insufficient to create a triable issue of fact as to an implied in fact contract and therefore grants defendant's Motion for Summary Judgment.

Counsel for defendant is to prepare an order consistent with this ruling and submit it to the Court for signature.

DATED this 29th day of June, 1992.


FRANK G. NOE
DISTRICT COURT JUDGE


AFFIDAVIT OF PATRICIA KIRBERG

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THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

BY *Barbara K. Noel* DEPUTY CLERK

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

PATRICIA J. KIRBERG,	:	
	:	
	:	AFFIDAVIT OF PATRICIA J. KIRBERG
Plaintiff,	:	
	:	
v.	:	Case No. 910901640 CV
	:	
WEST ONE BANK,	:	Judge Frank G. Noel
	:	
	:	
Defendant.	:	

STATE OF UTAH)
 : SS.
COUNTY OF SALT LAKE)

Patricia J. Kirberg, having been duly sworn, states and alleges under oath as follows:

1. I am the plaintiff in this matter, and have personal knowledge of the following.

2. I never read the disclaimer of implied terms or the disclaimer of requirement of just cause when I was hired as a teller. It was simply included in the forms I was to fill out. It was never referred to in the employment interview, and there was no statement made to me that I could be fired without cause.

000023

3. The disclaimers given me when I was hired as a teller were never referred to again, in either my own employment, or the employment of others.

4 I received no further disclaimers, except that sometime in 1990, a code of ethics booklet was distributed to all employees. There was no discussion of the specifics of the booklet with anyone, and especially not concerning any disclaimer relating to any right to fire employees without cause.

5. The code of ethics disclaimer was never referred to again in either my own employment, or the employment of others.

6. As branch manager, my duties included personnel issues in my branch. This in turn included employee discipline and termination issues.

7. I was given a Human Resource Policy Manual, to use in employee matters involving employees under me. A copy of a portion of the Manual entitled "Dismissal" is attached to this affidavit.

8. The Human Resource Policy Manual sets forth a system of progressive steps of employee discipline, including supervisory counseling, verbal warning, written reprimand, probation, suspension and dismissal.

9. The Manual advises that the severity of the problem is related to the degree of discipline. The understanding I drew from the Manual, the employee discipline practices I observed, and the

advice and training I received as a branch manager was that the discipline should be at the lightest (least) level necessary to correct the problem.

10. Further, I understood, and was trained, that an employee's problems needed to be fully documented or proved before they could be disciplined, to justify the severity of any action taken.

11. It was my understanding from the practices I observed, and I was taught, that an employee was not fired arbitrarily or without cause. I cannot think of a single instance where this happened.

12. There were at least two instances where I wanted to dismiss an employee under her for poor judgment and/or performance, but I was told she could not by my superiors. Instead, I was told that I must first counsel the employee, and warn them. In one instance, the employee was simply not showing up for work. This person was ultimately transferred to another department.

13. The only instance where someone under me was dismissed, involved someone who admitted to stealing customer's money. Even this dismissal did not come until after the employee personally confessed; prior to the confession, I was not allowed to dismiss her.

14. At the time I submitted Dr. Davis' loan applications, I

had no knowledge of his problems with the State of Utah, with his former employees, or with his patients.

15. Dr. Davis solicited the loan applications that I forwarded, and he satisfied the normal credit guidelines for approving loans by the loan processing center. The applications do not ask if a person has ever had any charges brought against them, or ever been accused of overcharging a customer. In fact, we were told not to inquire about other personal information, other than what was on the application form.

16. I did hear an unsubstantiated rumor in November, 1990, about Dr. Davis being charged with rape, overcharging customers and unspecified Medicaid regulation violations. I was told that all the problems had been resolved in the past, and specifically, that any criminal charges had been dismissed. I understood the problems to be at least several years old.

17. At the time I heard these rumors (in November, 1990), I did not know if it were true. However, to protect West One, I checked Dr. Davis' loans, and found that they were all current.

18. To the best of my knowledge, Dr. Davis' loans with West One are, and have been, current at all times. In fact, the only loan made to Dr. Davis after I heard the rumors, of \$30,000.00, was paid off in February, 1992.

19. In January, 1991, Dr. Davis sought another loan to re-

finance his business obligations.

20. At the time of Dr. Davis' application for all his loans, branch managers were directed to submit loan applications to Tim Conklin, a loan officer, for his review. Accordingly, I referred Dr. Davis' loan application to Tim Conklin for his review and approval.

21. Subsequently, in January, 1991, I was told by my daughter that the FBI was in Dr. Davis' office. I immediately called Conklin, and told him to be cautious in deciding whether to give a loan to Dr. Davis. I explained to him that the FBI was apparently investigating Dr. Davis.

22. The unsubstantiated rumor I heard about Dr. Davis was not enough to have called the existing loans, nor did Dr. Davis' objective financial situation warrant any action on my part.

23. At the time that I submitted Dr. Davis' loans, and up to and including my dismissal, West One had no policy barring loans to anyone who had ever been charged with rape, but had the charges dismissed later. No customer was ever asked this question.

24. At the time that I submitted Dr. Davis' loans, and up to and including my dismissal, West One had no policy barring loans to anyone who had ever been accused of overcharging by a disgruntled customer. No customer was ever asked this question.

25. At the time that I submitted Dr. Davis' loans, and up to

and including my dismissal, West One had no policy barring loans to anyone who had ever been accused of violating governmental business regulations. No customer was ever asked this question.

26. The only prior occasions when I received discipline were for security problems with the people under me. Specifically, the employees involved had failed to lock an outer vault door on one occasion, and failed to lock a cash drawer on another.

27. The risk to the bank from these prior incidents was much greater than the risk it faced from Dr. Davis' loans. However, I received only a written reprimand from these prior instances.

28. In my three years of employment with West One, I had observed a number of situations where an employee had been asked to make a judgment call, and in hindsight, had made the call the wrong way. None of these employees were dismissed, even though it cost the bank money on some occasions.

29. It is my belief that my decision not to pass on unsubstantiated rumors about claims made regarding a medical doctor's past conduct was a judgment call on my part. I felt that I owed it to Dr. Davis not to spread rumors that might have been very damaging, and very false.

30. Whether my judgment was right or wrong, it was not sufficient grounds to dismiss me, when judged against the prior instances of dismissal of West One employees.

FURTHER, AFFIANT SAYETH NAUGHT.

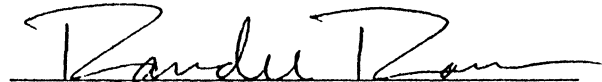
DATED this 23 day of March, 1992.


Patricia Kirberg

SUBSCRIBED AND SWORN to before me this 23 day of March,
1992.



NOTARY PUBLIC
STATE OF UTAH
My Commission Expires
September 17, 1995
RANDEE HOUSE
3540 South 4000 West, Suite 100
West Valley City, Utah 84120


NOTARY PUBLIC

My Commission Expires:

9/17/95

Residing at:

Salt Lake

CERTIFICATE OF MAILING

I hereby certify that on the 23 day of March, 1992, I served a true and correct copy of the foregoing AFFIDAVIT OF PATRICIA J. KIRBERG upon the following, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

Elizabeth Dunning
Carolyn Cox
Watkiss & Saperstein
310 South Main Street, Suite 1200
Salt Lake City, UT 84101

A handwritten signature in dark ink, appearing to read 'Daniel F. Bertch', is written over a horizontal line.

Daniel F. Bertch

MOORE FINANCIAL GROUP / HUMAN RESOURCE POLICY MANUAL

EMPLOYEE RELATIONS

Discipline

HRPM 130

CORPORATE POLICY

Employees of Moore Financial Group whose job performance or conduct is substandard or who violate corporate or affiliate policies, practices, or regulations are subject to disciplinary action. Depending on the severity of the problem, disciplinary action may result in progressive discipline, a negotiated voluntary separation, or immediate involuntary separation.

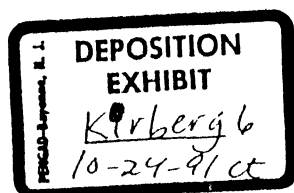
The company encourages harmonious working relationships among supervisors and employees. If possible, problems should be resolved on an informal basis. If more serious action is appropriate, the following disciplinary actions should be considered.

- Supervisory counseling
- Verbal warning
- Written reprimand
- Probation
- Suspension
- Dismissal.

Written documentation of the problem and the actions taken to correct it are helpful as a basis for avoiding misunderstanding of the issues involved, establishing a record of corrective action agreed upon, and knowing if the problem has been resolved or if more progressive disciplinary action is appropriate. Documentation is also helpful as a basis for fair and honest performance evaluations.

CORPORATE GUIDELINES

All forms of disciplinary action, be they counseling sessions, verbal warnings, reprimands, probation, suspension and/or dismissals should be documented by the immediate supervisor. Contact your appropriate Human Resource department for assistance in carrying through disciplinary action.



MAR 06 1987

K 00026

000102

EMPLOYMENT APPLICATION

ANCIAL
JUP

national origin, handicap, or any other basis prohibited by local, state, or federal law

APPLICATION

Patricia Jean Kirberg		DATE 10-25-88
LESS 782 E Michael Way		
STATE ZIP Tandy Utah 84093		
AVAILABLE M.M.	HOME PHONE 801-572-6799	BUSINESS / MESSAGE PHONE
POSITION(S) APPLIED FOR Teller		
EXPECTED SALARY		REFERRED BY Yellow Page
<input type="checkbox"/> FULL TIME <input type="checkbox"/> TEMPORARY <input checked="" type="checkbox"/> DAYS		
<input checked="" type="checkbox"/> PART TIME (hours) 8:30 - 3:30 <input type="checkbox"/> NIGHTS		

COMPANY USE ONLY	
APPOINTMENT	
STAFFING RESPONSE	
REFERENCE CHECK	FILE DESIGNATION
POSITION CONSIDERATION(S)	
OTHER INFORMATION	

COMPANY NAME AND ADDRESS

Santa Clara National Bank

PHONE NUMBER 805 251-0101	REASON FOR LEAVING Husband's death	HIRE DATE June 78	STARTING POSITION Teller	STARTING SALARY 675 ⁰⁰
SUPERVISOR'S NAME Cecilia Bedon	MAY WE CONTACT? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	LAST DATE MAY 88	ENDING POSITION Loan officer	ENDING SALARY 24600
PRIMARY JOB RESPONSIBILITIES Commercial & Consumer Loans - Collections - Business Development overseeing Note Department & New Accounts managing office in Managers absence Running all aspects of office when busy or Absent				

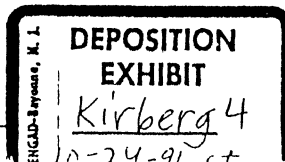
PHONE NUMBER	REASON FOR LEAVING	HIRE DATE	STARTING POSITION	STARTING SALARY
SUPERVISOR'S NAME	MAY WE CONTACT? <input type="checkbox"/> YES <input type="checkbox"/> NO	LAST DATE	ENDING POSITION	ENDING SALARY
PRIMARY JOB RESPONSIBILITIES				

COMPANY NAME AND ADDRESS

PHONE NUMBER	REASON FOR LEAVING	HIRE DATE	STARTING POSITION	STARTING SALARY
SUPERVISOR'S NAME	MAY WE CONTACT? <input type="checkbox"/> YES <input type="checkbox"/> NO	LAST DATE	ENDING POSITION	ENDING SALARY
PRIMARY JOB RESPONSIBILITIES				

COMPANY NAME AND ADDRESS

PHONE NUMBER	REASON FOR LEAVING	HIRE DATE	STARTING POSITION	STARTING SALARY
SUPERVISOR'S NAME	MAY WE CONTACT? <input type="checkbox"/> YES <input type="checkbox"/> NO	LAST DATE	ENDING POSITION	ENDING SALARY
PRIMARY JOB RESPONSIBILITIES				



W 00056

SCHOOL NAME AND LOCATION

Murray High School

Murray Utah

5000

AGE

MAJOR

DEGREE

GPA

4 - (- GRADUATE SCHOOL ETC)

MAJOR

DEGREE

GPA

11th classes

☐ TYPING _____ w p m

☐ COMPUTER SYSTEMS (specify) Dutchess

☐ SHORTHAND _____ w p m

☐ WORD PROCESSING (specify) _____

☐ 10 KEY (by touch) _____ s p m

☐ OFFICE MACHINES (specify) Typewriter

☐ DICTATING EQUIPMENT

☒ DATA ENTRY / KEYPUNCH

☐ PROOF OPERATION

Indicate any other skills which may qualify you for the position you seek

Do you have any handicaps or health problems which would interfere with or affect the successful performance of the job for which you are applying or which you would like to take into account in determining your job placement? If yes, please describe any specific reasonable accommodations MFGI can make that would assist you in working here

YES ☒ NO

Have you ever been convicted of a criminal offense involving dishonesty or breach of trust (including but not limited to robbery, embezzlement, forgery, perjury, tax evasion, shoplifting)? If yes, please explain

YES ☒ NO

A conviction will not necessarily bar applicant from employment

Has any company has ever refused to issue a bond for you, please explain (include name of the bonding company and when this happened)

ID

Have you ever been terminated from employment, please explain

JD

Please explain your career interests and goals and any particular interest you have in banking and employment with Moore Financial Group

I have been in Banking for 10 years, serving the public, contacts & helping people with their money needs. At this time I want only part time due to recently moving to this area & getting acquainted with family here

I authorize the release of all high school, college, or other educational records pertaining to my attendance, course work and other school activities

I further consent to the disclosure of any and all information about me contained in private and government files relevant to this application for employment or relating to my present and former employment history, and I request all present and former employers and federal, state and local government agencies to supply this information to you on your request. You are also authorized to make any investigation of my personal history and financial and credit record through any investigative or credit agencies or bureaus of your choice

I hereby ask my present and former employers to furnish you any personnel information you request and I release my present and former employers from any liability that may arise as a result of their providing this information to Moore Financial Group

I understand and agree that if I am employed by Moore Financial Group or any of its related companies or subsidiaries (the "company"), that I may resign or may be discharged at any time without notice and without cause. I understand no company representative has any authority to enter into an agreement with me different or contrary to the foregoing. I also understand that if I accept employment, there is no express or implied employment contract between me and the company. I agree to comply with all of the company's policies and procedures

I certify that all statements made by me on this application are true and complete. I understand that misrepresentations or falsification of statements made on this application constitute grounds for immediate dismissal.

Matthew A. Kuhn 400118

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of December, 1992, I served four true and correct copies of the foregoing ADDENDUM TO APPELLANT'S BRIEF upon the following, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

Elizabeth Dunning
Carolyn Cox
Watkiss & Saperstein
310 South Main Street, Suite 1200
Salt Lake City, UT 84101



Daniel F. Bertch